GOVERNMENT ARBITRATION AND MEDIATION

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Is government arbitration and mediation a success in the United States?

Should it be made compulsory?

Should the law forbid the calling of a railway strike until a public investigation and report can first be made?

What change is required in our present government system for settling disputes?

The present article is designed to show:

That the government system has succeeded far beyond the strongest expectation of its friends;

That this success has been won in the settlement of the same kind of labor disputes as those now coming up in national and local fields;

That these results have been attained without the element of compulsion, which is therefore unnecessary and even undesirable;

That the benefits of arbitration would be lost, and perhaps the whole plan defeated, by prohibiting strikes until an official investigation could be made;

That the only compulsory feature of a government system should be a public investigation and report.

The annual loss from strikes and lockouts in the United States now equals the fire loss, which is about $250,000,000. All are agreed that this waste of the national strength should be stopped, by government settlement if possible. But beyond this point there is the greatest diversity of opinion and misunderstanding of the facts. The general popular belief is that arbitration is the main feature of our present plan of settlement, and that since arbitration has failed (!) we must work out a new method. Few understand that the chief and most successful part of our system is "mediation," or, as it is sometimes called, "conciliation." In order to reach any conclusions on our future policy, we must first clear up these misunderstandings.

In both the national and state laws a sharp distinction is made

between mediation and arbitration. The first effort of public officials, when a dispute arises, is to "mediate." They interview each party to the dispute *separately* and secure the utmost concessions which each is willing to make. Next they try to bring about a settlement on the basis of these concessions. *This plan now disposes of over four-fifths of the railway cases that come up.* Arbitration, however, is entirely different. If the officials fail to secure enough concessions to settle the dispute, they bend their efforts towards obtaining an agreement of the parties to refer the dispute to a board of arbitration. This is the substance of the Erdman Act, the Newlands Act and all the state arbitration laws. Bearing this distinction in mind, let us glance at some of the results of the federal and state systems.

Three national laws have been passed to provide a method of settling disputes on interstate railways.

The law of 1888 was in one respect the best of the three, although it is no longer in force. It provided that the President might appoint two investigators who, together with the United States Commissioner of Labor, should form a temporary commission to examine the causes of any interstate railway controversy, the conditions which accompanied it, "and the best means for adjusting it." The report of this body was to be transmitted to the President and Congress. Such a purely investigating commission might be appointed on the request of either party or by the President himself, or need not be appointed at all. The act also contained a weak provision for a board of arbitration to be chosen by the parties if they wished, which should render a decision on all the matters in dispute. This decision, however, was not binding. That is, the parties might agree to arbitration without consenting to abide by its awards. This statute, which remained a dead letter on the books for ten years, was never utilized. The reasons are very simple and easily discovered:

(a) The balance of power lay entirely with the railway managers; many of the strikes were complete failures; the unions were on the defensive.

(b) Both sides in the labor controversies of the time were poorly organized. No principles or methods of dealing between labor and capital had yet been worked out. There were no established habits of procedure, but each strike or dispute was an event in itself, sepa-

rate and distinct from all others. We were in the "rule of thumb" stage of opinion on labor controversies.

For these reasons the decade 1888–1898, and even to 1905, represents an era in which arbitration was not the habitual but the most unusual thing to do.

The second law, known as the Erdman Act, was passed in 1898 and provided that the federal officers, on learning of a serious interstate dispute, should attempt to mediate in the method already described. Failing in this they should, if possible, persuade the parties to sign a contract, the terms of which were fixed by the law itself. This contract provided for the submission of the dispute to a board of arbitration composed of three members chosen by the parties themselves. The award made by this board should be binding for a definite period. An appeal might be taken from the board's decision to the federal courts. It is a remarkable fact that only one case was brought up under this law in the first eight years of its history. This shows clearly that the parties concerned, and public opinion in general, had not yet developed to the point where arbitration was a natural and instinctive method of settlement. In the one case that was presented during this time the railways declined arbitration and the government system failed. The employes voted to strike by an almost unanimous ballot, whereupon the managers conceded the substance of the union's demands,—a settlement that could have been easily made by arbitration. Meanwhile in the period from 1901 to 1905 there were 329 strikes affecting the railways, with only this single case of attempted arbitration above described, and it a failure. This would seem to show conclusively that the unwillingness to make use of the previous act was not due to the weakness of the law, but to the lack of experience of the parties and the backward state of public opinion.

Beginning with 1905, however, a complete reversal in conditions took place. Despite the failure of several abortive attempts, the unions had finally got a firm grip upon all the labor supply of the interstate trains. With this there had come a parallel development in the control of railway capital; mergers had taken place; railway systems had been more firmly cemented together; the "community of interest" between competing lines had become a familiar feature of transport management. In 1902 the public had received that dramatic proof of the possibilities of arbitration which we still refer

to as "the" anthracite coal strike. This was probably the last great controversy in which the mining companies felt assured of success in a contest with labor organizations, and when victory was within their reach it was wrested from them by the national executive who forced arbitration. It is difficult to exaggerate the spectacular effect of this case. It established once for all the fact that arbitration on a grand scale in a crisis of national proportions is possible. The similarity of the issues with those arising on the railways was also helpful. This striking demonstration removed the chief obstacle to the use of the Erdman Law, and in the next eight years there followed in rapid succession a series of 61 cases, most of which were finally solved by mediation, there being only 12 in which arbitration was necessary.

The third act, known as the Newlands Law, was passed in July, 1913. It differs from the Erdman Act in only two important points,—the boards of arbitration under the Erdman Act were considered too small by the railway managers; under the Newlands Act they may, by consent of the parties, be doubled to six members instead of three. The new law also provides that the work of mediation shall be undertaken by a special, permanent commissioner of mediation acting with one or two other federal officers, to be designated by the President, and forming a "Board of Mediation and Conciliation." Following the 61 cases presented for settlement under the Erdman Act, 60 more have already been brought up under the Newlands Law, that is, in the last three years as many controversies have been submitted and settled as in the entire preceding twenty-five years. Of these 60 cases, 51 have been settled by mediation and 9 by arbitration.

Taking the entire results of the Erdman and Newlands Laws since 1906, that is, since arbitration has become an accepted method, we observe that a total of 121 cases have been submitted. Of these over 70 were settled by mediation. Of the remainder, 21 cases were settled by arbitration, or by arbitration combined with mediation. In the remaining cases, the services of the mediators were either refused or a direct settlement made without resort to arbitration. This is an astonishing record. Two features stand out with especial prominence—the rapid increase in effectiveness of mediation, and the great importance and breadth of the problems submitted to arbitration. Mediation settled more than half of the

controversies brought up to the board under the Erdman Law, and over four-fifths of those brought in the last three years under the Newlands Act. Among the matters subjected to arbitration were issues ranging from the most minute point up to the entire terms of employment on over 40 railroads; from the discharge of an electric motorman for disobedience of orders to the settlement of pay and basic hours of work per day for many thousands of men.

Since 1910 a great cycle of demands from all of the brotherhoods has been presented to the railways. In November, 1912, the engineers asked considerable increases. The substantial part of these was granted by an award under the Erdman Act. In April, 1913, the firemen followed. Next came the conductors and trainmen in eastern territory in July, 1913, under the Newlands Act, and finally the engineers and firemen in western territory in 1914–1915 under the same law. In every one of these a marked and substantial advance was scored by the employes. It has been claimed that in a recent case the employes discovered that two members of the arbitral board owned stock in the railway concerned. It has also been complained that in some recent controversies the employes have not received all that they might properly expect. These are the only reasons made public for refusing arbitration in 1916. Against them stand the long series of awards above described covering a period of ten years in which the most meticulous care has been taken to preserve both the sensibilities and the substantial justice of the employes' side of each case. Even in the controversy arising over the discharge of a motorman, already mentioned, the arbitration board upheld the discharge on the ground of absolute public responsibility of the railway officers to enforce obedience to train despatchers' orders, but suggested a reinstatement after 60 days' suspension. The same course was taken in a similar case arising under the sixteen hours of service act.

These facts must be weighed in judging the results of our national system. For it is not sufficient that arbitration shall "keep the trains running." A plan of settlement to be permanent must offer more than this. It must afford a means of securing substantial justice. Any system which continuously raised wages in times of business disaster or which kept them down when prosperity was at the flood tide, would be unjust and hostile to the public interest. If arbitration has erred from this standard it has been on the safe

side, in favor of labor. Arbitration has kept the wheels turning and has been fair to labor. It has awarded a marked increase in pay and a reduction of the basic hours of the work day of every interstate train employe in the country.

In the state governments the experience has been less favorable, but shows the same general tendencies as in the national system. Wherever, as in Massachusetts and New York, the *custom* has arisen to refer disputes to arbitration and mediation, the state system has produced results. On the other hand, where public opinion on the question is not active, the parties usually prefer to fight it out among themselves, and the mere presence of an arbitration law on the statute book is of no consequence. This is a counterpart of the early history of the Erdman Act. The habit of arbitration and a public insistence on it must first be formed before an arbitral law can produce any valuable effects.

The state acts have usually followed the Massachusetts statute passed in 1886. It provides for a state board of conciliation (mediation) and arbitration. This board receives notice from the city or town authorities of any dispute which involves more than 25 persons. The parties themselves may also send notice to the board. Upon receiving notice it communicates with both parties and tries to reach an amicable settlement by mediation. Failing in this, it arbitrates. If this also cannot be secured, the board investigates and makes a report, setting forth the causes and assigning the responsibility for the controversy. It may also at any time make an investigation and public report upon any labor controversy affecting the public welfare. There are some important variations in the laws of the other states. In Pennsylvania and Ohio, for example, a single officer is entrusted with these duties. He first mediates and, if unsuccessful, he then encourages the appointment of a special board of arbitration by the parties. In Illinois and New York the state board itself acts as the arbitration tribunal. In some states the legislatures have merely passed an arbitration act and then dismissed the whole matter from their minds. In California there is an admirable "system" but no arbitration, since the legislature has not even appropriated money for the board.

The Massachusetts and New York systems have proven the most successful, particularly the former. In the single year 1915

there were 204 disputes submitted to the state board. Of these, 86 were voluntarily submitted for arbitration; 100 others were settled amicably by mediation. In 18 others, mediation failed and arbitration was refused, so that the board used the power above described of making a public inquiry with recommendations. These were accepted by the parties in all except 5 cases.

A reasonably well administered state system will also greatly shorten the life of any labor controversy. What this means to the community as a whole can best be realized from the figures given by the arbitration board of any large industrial state. If the dispute is serious and widespread and involves the employment of troops to preserve order, the loss to the community is a staggering one. The Ohio board estimates the cost of the Youngstown Sheet and Tube Company strike in 1916 at about $150,000 per day. The value of any plan which cuts short such controversies and promotes a just settlement, therefore, requires no comment. Here the statement of the Massachusetts board in February, 1916, is especially pertinent—"The investigation which the board must make in compliance with the statute in any strike or lockout involving 25 or more employes substantially prevents a long drawn out controversy." This board is also called on frequently for advice by both employers and workmen and aids in the prevention, as well as the settlement, of controversies. It has constantly before it for mediation or arbitration from 20 to 40 cases, and the industries of the state have formed a fixed habit of referring disputes either to the state board or to local tribunals. The members of the board believe that this habit could be strengthened by systematic advertising in the newspapers, calling the attention of employers and unions to their duty to give notice to the board before resorting to a strike or lockout.

In Ohio the results are also excellent, although not as remarkable as in Massachusetts. Local boards are also frequently called on in that state. In the last two and one-half years, 26 industrial disputes have been taken up under the provisions of the act. The number of employes concerned has varied from a mere handful to over 9,000. During this period not a single case of arbitration has occurred, but the state officials have secured settlement through mediation. This has been successful in 11 of the 26, but these 11 include all of the larger and more important cases, except those in

which the chief or sole question was that of hours. Here mediation has been less successful.

At first glance this result seems rather small, but it must be remembered that only the most difficult cases come to mediation in Ohio. Where both sides are well organized and accustomed to dealing with each other, trade agreements or voluntary settlements are the rule, and state settlements are only sought in absolute deadlocks or where organization is weak. It is also notable that violence is almost eliminated during the time that mediation is in progress. Both sides defer all "last resort" measures pending the state attempts to effect a settlement. Mediation has shown a notable influence in removing the bitterness that often occurs in such disputes. This is in part due to the invariable policy followed by mediation boards of seeing each side separately. The Ohio board, in its report for 1916, says on this point: "In mediating strikes in Ohio during the period covered by this report, the representatives have seldom been brought together in conference, but instead confidential conferences have been held first with one side and then with the other until the facts in the case were secured and a satisfactory basis of settlement determined upon by the mediators. Usually the final terms of settlement have come not as a proposal from either side, but as a proposal from the mediators with the definite understanding that unless it was accepted without change by both sides, the proposition would be withdrawn by the mediators and each side would be in exactly its former position. Mediation under this plan does not disclose to either side either the weak points or the strong points in the position of the opposing side."

If, despite all these results, it should be urged that a new type of demand is now arising on the railways viz., for a *reduction of hours*, and that this cannot be settled by compromise, such objection must be weighed against all that we now know of the possibilities of arbitration. Undoubtedly the matter of hours requires an immediate remedy. The present situation on this point is no longer defensible.

The writer has before him the time record of a man who for 12 continuous months in 1915 worked over 11 hours a day, seven days a week, and there are numerous examples of ten-hour, seven-day men. The hours problem is one that requires an immediate solution, whether arbitration succeeds or fails. But that it can

succeed on this very point may be seen from the merest glance at the arbitration awards under the Erdman and Newlands Acts. Hours of work have frequently come up in the demands of the railway brotherhoods, and the establishment of the ten-hour day as a basis of payment on the railways is itself the result of these very arbitrations. Every scintilla of evidence that can be collected shows the ability of the arbitration system to handle this question justly and fairly on the railways. There is no type of demand which today finds so cordial a response in the public mind as the cutting down of working hours to reasonable limits. This definite change in ideas is now a well established part of our social customs; it is thoroughly familiar to the public, and is in line with what may be called our general social policy. It is precisely by inquiry, public report and arbitration that this progress can now be best realized.

In the minds of many persons our present system falls short because it does not provide a legal compulsion for the settlement of disputes in public service industries like the railways. Economic war, they say, is antiquated and should be prevented by the same method that was long ago adopted to stop private war—a compulsory tribunal. Accordingly they ask that either arbitration should be absolutely required by law in public industries or else that, as in Canada, a strike should be forbidden until due notice of the dispute has been given to the public authorities and a period of 30 days allowed for public investigation and report. There is much force, particularly in the latter view. We are undoubtedly approaching a time when it shall be necessary for the parties in interest to stop and at least listen to public opinion before they resort to force. Every consideration of public interest seems to dictate an enforced period of this kind, to be devoted to impartial inquiry and the publication of the facts with an unbiased proposal for the settlement of the dispute. But it is equally clear that we have not yet arrived at this point. Our public opinion has not yet been expressed in definite, unmistakable terms, nor are we willing to enforce any form of compulsion. We must first have some striking and dramatic proof of the need of compulsion before we shall be in earnest about it. There is only one way to force arbitration by law or even to prevent a strike by law pending an investigation and report—that is to punish by fine or imprisonment the violators of the law. Can we in the present state of public opinion prevent men from entering

into a combination of this kind? Let anyone who thinks that this is possible without a strong change in public opinion, first picture to himself the scene in court when a union official were to be sentenced to fine or imprisonment for promoting a strike. To secure a conviction we must first have borne in upon the public mind the strong belief that a fair and impartial method of settlement was possible, and that a great public calamity had been brought about by the refusal of the accused to resort to this tribunal. When we have established these two points beyond dispute in popular opinion, we shall be ready for a Canadian plan, but not until then. In the celebrated Bucks Stove & Range case, the three union leaders involved, escaped largely by reason of their prominence, their undoubted high character and ability, and the peculiar nature of the dispute in which they were involved. But it was unquestionable that they had violated the law. When the meat packers were accused of entering into a combination to manipulate prices, contrary to the Sherman Act, the government secured an immense amount of evidence which it considered unanswerable. Yet it could not secure a conviction. The trial lasted several months and cost nearly one million dollars. The jury rendered a verdict of not guilty. Aside from the technical difficulty of proving a combination, whether to promote a strike or to manipulate prices, there is a lack of strong, definite, clear-cut opinion as to what is permissible under the rules of the game of business.

It is useless to multiply laws, writs and compulsory processes, until the public has definitely and unmistakably set its face towards the enforcement of the law. A compulsory statute might be praiseworthy as the expression of a pious wish, but it would settle no controversies. During our present attitude of indecision can any one imagine a department of justice or a federal administration which would attempt to enforce such a law without the support of strong public opinion? This applies not only to the railways, but to the state systems of arbitration as well. No prominent association of manufacturers has advocated compulsory settlement. As for the workers, the union heads positively repudiate the idea in unmistakable terms.

In order to maintain the right to strike, the union heads feel that all forms of compulsory arbitration or compulsory postponement of strike must be defeated. Mr. Gompers has said: "Arbi-

tration is only possible when voluntary. It never can be successfully carried out unless the parties to a dispute or controversy are equals or nearly equals in power to protect or defend themselves." During this transition period we must get along without compulsion. We must wait until, through the inconvenience, the loss and the suffering of a great railway strike, we are all convinced—not of the advisability—but of the necessity of a compulsory system.

And now to consider the last of the questions with which we started,—what additions, if any, should be made to our present government plan of settlement? The tentative suggestion offered here is to make nothing compulsory but investigation, and to leave this in the control of the President in interstate disputes, and in the judgment of the state boards of mediation in local cases. But, it will be asked, how would such a simple provision have prevented a general railway strike? Was not an ultimatum delivered to the President that something must be done before Labor Day or traffic would be paralyzed? And was not the Adamson Act passed as the only avenue of escape from this catastrophe? The answer is to be found in certain facts which, for some reason, have never been pressed home upon the public—perhaps because of the distractions of a presidential election.

(a) The unions never demanded the passage of the Adamson Act; they were on the whole rather opposed to any law on the subject.

(b) Their demands were not made on the first of September, but in the preceding spring and were definitely formulated for public consumption as early as May.

(c) At the time of writing, December, there are large numbers of brotherhood members who do not know what the real provisions of the Adamson Law are,—some even think that it limits work to eight hours per day.

(d) Many of those who do understand the act are extremely dissatisfied with its provisions and some even violently opposed to it.

(e) A very considerable proportion of freight trainmen are employed for much longer hours than the public would approve.

If the above is a fair statement of the conditions, it will appear that there was abundant time for an investigation before the passage of the law; that such an investigation would have immediately

turned up certain facts and grievances which would have been remedied in the natural course of events, just as all other unreasonable conditions in railway employment have been remedied when made public or arbitrated; that such a substantial change could have been made in these conditions as to remove all possibility of a strike or of public support for a strike if one had been ordered, and that all real danger of a conflict would have been averted. The proper remedy then was not a compulsory arbitration, nor a compulsory suspension of the right to strike, but a compulsory investigation and public report of facts with a proposed settlement. If the President possessed and would use this authority, the chief cause of railway strikes would be removed.